

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0172**

*Modified*  
*Overpayment, No Penalties*  
*(Sobrepago, no Sanciones)*

**PROCEDURAL HISTORY:** On October 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 134450). Claimant filed a timely request for hearing on decision # 134450. On October 30, 2015, the Department served notice of an administrative decision assessing a \$1,572 overpayment, \$235.80 monetary penalty and 12 penalty weeks (decision # 193949). Claimant filed a timely request for hearing on decision # 193949. On November 3, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 134450 scheduled for November 13, 2015. On November 13, 2015, ALJ R. Frank issued Hearing Decision 15-UI-47601, dismissing claimant's hearing request for failure to appear. On December 3, 2015, Hearing Decision 15-UI-47601 became final. On January 19, 2016, OAH mailed notice of a hearing on decision # 193949 scheduled for February 2, 2016. On February 2, 2016, ALJ Shoemake conducted a hearing, and on February 5, 2016 issued Hearing Decision 16-UI-52503, affirming decision 193949 #. On February 16, 2016, claimant filed a request to reopen the November 13, 2015 hearing on decision # 134450 with OAH, and filed an application for review of Hearing Decision 16-UI-52503 with the Employment Appeals Board (EAB). On February 25, 2016, ALJ Shoemake issued Hearing Decision 16-UI-53793, dismissing claimant's request to reopen the hearing on decision # 134450.<sup>1</sup>

Claimant's argument included a request to reopen the November 3, 2015 hearing on decision # 134450, details about claimant's employment with and discharge from Heritage Hazelnut Farms, and information about why claimant missed the November 3, 2015 hearing.<sup>2</sup> However, EAB has jurisdiction only based

<sup>1</sup> That decision becomes final on March 16, 2016 unless claimant files an application for review with EAB.

<sup>2</sup> Claimant used the same documents to file his February 16<sup>th</sup> request to reopen and application for review. At the time this decision was issued, claimant had not requested that EAB review the ALJ's February 25, 2016 decision to deny claimant's request to reopen. Unless claimant files an application for review of the February 25<sup>th</sup> decision, EAB lacks jurisdiction to review the ALJ's February 25<sup>th</sup> denial of claimant's reopen request. *See* ORS 657.270(6) (the ALJ's decision will become

on claimant's application for review of Hearing Decision 16-UI-52503, which assessed an overpayment and penalties. We therefore confine our review to that matter, and will not address claimant's work separation from Heritage Hazelnut Farms or the reopen request.

**FINDINGS OF FACT:** (1) On August 30, 2015, Heritage Hazelnut Farms, Inc. discharged claimant.<sup>3</sup> The employer notified claimant by leaving a message ending claimant's employment with another person. Claimant was told he was "terminated" and "laid off." *Compare* Transcript at 11-12, 14, 16. Claimant did not believe any other employees were working at the time his employment ended.

(2) On September 5, 2015, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$393. He reported to the Department that his employment with Heritage Hazelnut Farms ended due to a lack of work. Based on claimant's report to the Department, the Department paid claimant \$393 per week for four weeks, from September 6, 2015 to October 10, 2015.

(3) Based on decision # 134450, the Department disqualified claimant from receiving unemployment insurance benefits between September 6, 2015 and October 10, 2015 because of his discharge from Heritage Hazelnut Farms. Had claimant reported to the Department that he had been discharged rather than laid off, the Department would not have paid claimant benefits until it had completed an investigation into whether claimant's discharge disqualified him from unemployment insurance benefits.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant was overpaid benefits that he is liable to repay or have deducted from future benefits payable. We conclude, however, that claimant did not make a willful misrepresentation and is not liable for a monetary penalty or penalty weeks.

ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

The Department paid claimant \$1,572 in unemployment insurance benefits between September 6, 2015 and October 6, 2015. As a matter of law, however, claimant was disqualified from receiving benefits during those weeks because of his disqualifying work separation from Heritage Hazelnut Farms, Inc. He was, therefore, overpaid \$1,572 in unemployment insurance benefits. Claimant received benefits he was not entitled to receive because he reported to the Department that he had been laid off from Heritage Hazelnut Farms. The Department has concluded, however, the claimant's work separation was the result of a discharge, not a layoff. Therefore, and regardless of claimant's intent when he filed his initial

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final unless claimant files an application for review); ORS 657.275 (EAB reviews cases pursuant to parties' applications for review).

<sup>3</sup> We take notice of this fact, which is contained in Employment Department records in decision # 134450. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

claim, his report to the Department that he was laid off from Heritage Hazelnut Farms was false. Because claimant received an overpayment of benefits as the result of his false statement to the Department about his work separation, he is liable to either repay the overpaid benefits or have the amount of the benefits deducted from any future benefits otherwise payable.

An individual who willfully made a false statement or misrepresentation to obtain benefits may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified for benefits under ORS 657.215 is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

The ALJ concluded in Hearing Decision 16-UI-52503 that claimant's false statement about his work separation was made willfully and that claimant was subject to penalties for making a misrepresentation. The ALJ found as fact that claimant was told he was "terminated and that the employer was replacing him" and, although claimant said he was laid off, the ALJ was "persuaded that claimant knew his employment did not end due to a lack of work" because he was told that he was terminated and the employer was finding someone to replace him, and because claimant had recently "threatened to walk off the job." Hearing Decision 16-UI-52503 at 2-3. We disagree with the ALJ for several reasons.

We have no basis to conclude that claimant's version of the events surrounding his work separation from Heritage Hazelnut Farms lacked credibility. The employer did not end claimant's employment directly, it left a message for claimant with someone. Transcript at 11. The message is not in the record, nor is there any way of knowing whether the person with whom the employer left the message accurately informed claimant what the message said. The employer did not notify claimant why it was ending his employment. Transcript at 12. Therefore, it is plausible that claimant could reasonably be confused about the nature of and reason for his discharge from Heritage Hazelnut Farms. Although claimant said that he was "terminated" and "laid off," when asked by the ALJ to explain why he reported to the Department that he was unemployed due to a lack of work if he was told he was terminated, his answer was truncated because too many people were speaking at once, leaving only a partial statement "... to me that I was terminated. He said like laid off." See Transcript at 14. All that we can reasonably infer from that partial statement is that, at some point, claimant was told he was laid off from work. Although claimant testified that the employer was going to look for someone else to replace him, he also testified that no other employees were continuing to work at the time his employment ended. Transcript at 12. Claimant's belief that he was laid off was plausible under the circumstances.

The record also does not show that claimant *knew* that he was discharged rather than laid off work. Claimant did not, as the ALJ wrote, "testif[y] that he was laid off," claimant testified that he was "told" he was laid off. Transcript at 14, 16. He also testified that he was told that he was terminated. Transcript at 11-12. Although claimant's testimony about whether he was laid off or was terminated appears inconsistent, we cannot conclude on the basis of this record that claimant's inconsistent testimony was due to a lack of credibility during the hearing. There were several places in the hearing where claimant's testimony was truncated because it was either inaudible or indistinguishable from other participants in the hearing. See *e.g.* Transcript at 11, 12, 14, 15, 16. There were points during the hearing where claimant appeared not to understand the ALJ's questions. See *e.g.* Transcript at 13, 15. The hearing in this matter was interpreted, since claimant's primary language was not English, and there were several points during the hearing where the interpreter stated that she did not understand claimant's testimony. See *e.g.* Transcript at 12-13, 14-15. Because we do not have a clear or complete record of

what claimant said at the hearing, we cannot conclude that claimant was not a credible witness at the hearing based on one apparent inconsistency in his testimony.

Finally, it is unclear whether claimant understood the significance of the distinction between a “layoff” and a “termination” for purposes of claiming unemployment insurance benefits. Claimant appeared to use the words interchangeably during the hearing, and, notably, the Department does not ask claimants filing their initial claims for benefits to report if they were laid off or “terminated,” it asks if they were laid off or “discharged.”<sup>4</sup> The record does not show what claimant thought it meant to be “terminated” as opposed to “laid off” or “discharge,” whether claimant was confused about the categories of work separations available to him when filing his initial claim, why claimant thought choosing the “laid off” option when reporting his separation to the Department was the most appropriate choice among those available, or why he did not select “discharge” to describe the separation. As such, the record lacks evidence suggesting that claimant understood the distinction between a “termination” and a “layoff” and deliberately misrepresented his separation. In the absence of evidence about what claimant’s thought process was when he selected “layoff” instead of “discharge” when reporting his work separation to the Department, the record fails to show that claimant willfully made the wrong choice in order to obtain benefits he would not otherwise have been qualified to receive.

In sum, claimant was told that his employment had ended by a third party delivering a message from the employer, he was not told that there was a reason the employer had decided to end his employment, much less what that reason was, he was told that he was “terminated,” or “laid off,” or both, and, to his knowledge, while the employer intended to replace him, no other employees were working at the time claimant’s employment ended. Given those facts, the record fails to show that claimant intentionally misrepresented the nature of his separation to the Department when he reported his work separation as a layoff.

Because claimant’s overpayment was not the result of a willful misrepresentation to the Department, claimant is not liable for a monetary penalty or penalty weeks. He is liable only to repay the \$1,572 overpayment or have it deducted from future benefits otherwise payable.

**DECISION:** Hearing Decision 16-UI-52503 is modified, as outlined above. *Decisión de la Audiencia 16-UI-52503 se modifica, de acuerdo a lo indicado arriba.*

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** March 2, 2016

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the

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<sup>4</sup> We take notice of this fact, which is contained in Employment Department records and within our area of specialized knowledge. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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